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Lytle v. Lytle Respondent's Brief Dckt. 42128

IN THE SUPREME COURT FOR THE STATE OF IDAHO

///

CHARLES LYTLE, Plaintiff-Appellant,	} Supreme Court Docket No. 42128-2014
v.	} Bonneville County Docket No. CV-1991-43212
JULIE LYTLE, Defendant-Respondent	}

RESPONDENT'S BRIEF

Appeal from the District Court of the

Seventh Judicial District of the State of Idaho

In and for Bonneville County

Honorable Jon J. Shindurling, Jr., District Judge, Presiding

REGINALD R. REEVES, ESQ.
Respondent's Attorney
Cambridge Law Center
Idaho Falls, Idaho

NATHAN M. OLSEN, ESQ.
Appellant's Attorney
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STATEMENT OF FACTS

1. On October 1, 1991, through counsel, MARVIN R. STUCKI, ESQ., Plaintiff filed a Complaint for Divorce, claiming to be a resident of Idaho. R. pp. 10-14.

2. Through her counsel, REGINALD R. REEVES, ESQ., defendant filed an Answer and Counterclaim, denying such claim of residence, and specifically alleging (at ¶5) that plaintiff had the ability to pay to defendant a reasonable sum for maintenance and child support, and the prayer thereof specifically requesting "a reasonable sum for maintenance and support." R. pp. 15-17

3. Plaintiff filed no reply to the Counterclaim. R. p. 108.

4. Upon and Affidavit for Order to Show Cause {R. Add. pp. 16-18] an Order to Show Cause was entered, regarding child custody, child support, maintenance, attorney's fees, and the use of the community residence. R. Add. pp.12-14.

5. Plaintiff appeared at the Show Cause hearing, through substitute counsel, STEVEN A. MEIKLE, ESQ. R. Add. pp. 14 & 19.

6. Such Order to Show Cause was made final, and an Order on Order to Show Cause was entered, on November 13, 1991, requiring plaintiff to pay child support, maintenance, and attorney's fees. R. Add. pp. 19-20.

7. Plaintiff's default was entered on January 30, 1992. R. Add. p. 25.

8. Mr. Stucki re-entered the case, and filed Motions to Set Aside Default and for Reconsideration of such Order on Order to Show Cause. R. Add. pp. 22-30.

9. Such Motion for Reconsideration was supported by an Affidavit, partially in plaintiff's own handwriting, and signed by plaintiff. R. Add. pp. 35-36.

10. Thereafter, Mr. Stucki withdrew, and, apparently, there was no hearing on such Motion to Set Aside Default or the Motion for Reconsideration. R. Add. pp.37-38.

11. Upon proper notice to plaintiff, his default was again entered, on July 6, 1992. R. Add. pp. 1 and 39.

12. A Default Decree was entered on September 15, 1992. R. pp. 31-34, with service upon plaintiff.

13. Such Decree included amounts of child support and spousal maintenance which differed from those demanded in such counterclaim. R. p. 32

14. Such amounts, however, were consistent with the amounts shown in such Order on Order to Show Cause, which was still in effect. R. Add. pp. 19-20.

15. On December 17, 2012– – more than 20 years following the entry of such Decree(of which he had knowledge)– – plaintiff filed a Motion for Relief From Judgment, citing IRCP 12(b)(1), (3), (4), and (6). R. pp. 22-23.

16. Defendant filed a Motion to Dismiss such Motion for Relief, with an affidavit in support thereof. R. pp. 37-39.

17. Defendant's said motion was granted, upon the ground that plaintiff's motion, filed after more than 20 years, was untimely. R. pp. 68-69.

It is worthy of note that plaintiff did not request that the Clerk's Record on Appeal include the following items:

Affidavit for Order to Show Cause.

Order to Show Cause.

Order on Order to Show Cause, dated November 13, 1991.

Notice of Substitution of Legal Counsel of Record, Date March 3, 1992.

Plaintiff's Motion to Set Aside Entry of Default.

Plaintiff's Motion for Reconsideration of Order on Order to Show Cause, dated March 5, 1992.

Affidavit of Plaintiff's Counsel, dated March 5, 1992.

Pre-trial Memorandum, of March 27, 1992.

Plaintiff's Affidavit of Income and Expenses.

Motion to Withdraw as Legal Counsel of Record.

Default dated July 7, 1992 (actually July 6, 1992).

which items were requested in defendant's objection, and subsequently provided in the Clerk's Addendum; and which were essential parts of the record on appeal.

ADDITIONAL ISSUES PRESENTED ON APPEAL

I

WHETHER PLAINTIFF'S
MOTION FOR RELIEF
WAS TIMELY, UNDER
IRCP 12(b)(4), or (6), OR
ANY OTHER RULE?

II

WHETHER PLAINTIFF IS
BOUND BY ACTIONS
TAKEN (OR HEARINGS
PARTICIPATED IN)
BY HIS COUNSEL OF RECORD?

WHETHER PLAINTIFF IS
ENTITLED TO BE HEARD
AS A MOVING PARTY, ON
A RULE 60(b) MOTION, WHERE
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IS ENTERED UPON A
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PARTY WHO FAILED
TO AVAIL HIMSELF
OF THE RIGHT TO
A TIMELY APPEAL AND AS
A SUBSTITUTE FOR SUCH APPEAL?

ARGUMENT

I

UNTIMELINESS OF PLAINTIFF'S MOTION

A motion pursuant to IRCP 60(b) must be made within a reasonable time. The times set forth in such rule are: six months, for reasons 1, 2, and 3; and one year, where there was no personal service. Plaintiff did not meet any of such time requirements.

The issue of timeliness was first raised in defendant's motion to dismiss. Tr. Vol. 1, p. 35, Lines 6-11. R. pp. 109, 110, & 115-116.

Plaintiff's motion purports to claim relief pursuant to IRCP 60(b) (4), claiming that the decree is void, but the Idaho Supreme Court has held that a judgment is not void, unless there is some jurisdictional defect in the court's authority to enter the judgment (McGrew v. McGrew, 139 Idaho 551), or the court lacks personal jurisdiction (Puphal v. Puphal, 105 Idaho 302). Plaintiff has made no showing of either of such defects. The court had jurisdiction over a divorce action, and, by initiating the action (and appearing therein through counsel and by affidavit), plaintiff submitted himself to the personal jurisdiction of the court. R. pp. 10-14 & R. Add. pp. 35-36.

It was held, in United Student Aid Fund v. Espinosa, 553 F. 3d 1193, that:

> A judgment is not void simply because it is or may have been erroneous . . . Similarly, a motion under Rule 60(b)(4) is not a substitute for a timely appeal . . . Instead, Rule 60(b)(4) applies only in the rare instance where a judgment is premised upon a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard.

Here, the plaintiff initiated the action, for a divorce [R. pp. 10-14], in a court having subject matter jurisdiction, thus submitting himself to the personal jurisdiction of the

court; he appeared through counsel; and failed to file a reply to the counterclaim. R. p. 108.

Plaintiff was aware of the entry of the decree, a copy thereof having been mailed to him by the Clerk, on September 15, 1992, the date of the entry thereof. R. pp. 18-21.

Although the rule states that the motion shall be made within a reasonable time, the specificity in the rule would appear to limit the scope of reasonableness to the stated six months, or, at most, one year.

The time limitations set forth in Rule 60(b) are as follows:

(1) Not more than six months after the judgment was entered.

(2) Not more than six months after the judgment was entered.

(3) Not more than six months after the judgment was entered.

Even in the case of a judgment against a party who was not personally served, or who has failed to appear in the action– – or where there has been fraud upon the court– – the rule only allows a period of <u>one year</u> for the filing of an independent action for relief from judgment. The question of reasonableness of time is measured from the time the party first learned of the decree. Here, the record shows that the Clerk sent notice to plaintiff on September 15, 1992, upon the entry of the decree on that date.

The trial court stated that:

> "it's clear from that Affidavit that he knew about the judgment at some point, but of even greater concern to me from the moment I saw this case was the fact that he's the Plaintiff and to lose track of the case when you're the Plaintiff in the action, especially in a divorce action that's personally relevant. I mean, it's not a business transaction that you can walk away from and it will disappear after a while. Just the fact that Mr. Lytle's the Plaintiff in the action and we're 20 years out, I think just those two facts alone that are gleaned from the file and the Motions are enough to grant the Motion to Dismiss." R. pp. 68-69.

If a Rule 60(b) motion can be made 20 years after judgment, why not 30 years – – or even 50 years – – which clearly would be an absurdity?

In Harter v. Products Management, 117 Idaho 121(App), the Idaho Court of Appeals refused to grant relief under IRCP 60(b)(4), upon the ground of untimeliness, holding that the "motion had not been filed within a reasonable time as required by Rule 60(b)" – – the motion having been filed approximately one year after the judgment was entered, the court holding that the trial court "had jurisdiction over the parties and the subject matter of the action," and that "there was no showing that the motion was filed within a reasonable time."

The Court of Appeals stated that:

> Rule 60(b) requires that a motion for relief from a judgment must be filed within a reasonable time. The record on appeal in this case contains no affidavit or other showing presented to the district court to establish the timeliness of [his] motion. P. 122.

And, that IRCP 54(c) "mandates that every find judgment shall grant the relief to which the prevailing party is entitled." P. 122.

In the instant case, the counterclaim specifically requested that plaintiff be required to pay "a reasonable sum for maintenance and support," and alleged that "plaintiff had the ability to pay "such a reasonable sum. R. pp. 15-17. Although the amounts stated in the decree differed somewhat from the amount, specifically stated in the counterclaim, they were consistent with the "reasonable sum" requested, and with the amounts stated in the order on Order to Show Cause.

In the Harter case, no answer to the complaint was filed. In the instant case, although represented by counsel, and having adequate opportunity to do so, plaintiff filed no reply to the counterclaim. R. pp. 1 & 108.

Here, plaintiff appeared, by counsel, and, by his own affidavit, prior to entry of the default decree, and by motion for reconsideration. He cannot now be heard to claim absence of knowledge, or lack of the opportunity to defend himself.

II

PLAINTIFF IS BOUND BY ACTIONS OF HIS ATTORNEYS

"Litigants freely choose their attorneys and cannot avoid consequences of the attorney's actions." Devault v. Herndon, 107 Idaho 1; DHW v. Conley, 132 Idaho 266; and Harmston v. Agro-West, 111 Idaho 814.

"Generally, attorney of record has implied authority to enter into stipulations and agreements respecting matters of procedure." In the Interest of Holt, 102 Idaho 44. Attorney of record, therefore, had authority to designate substitute counsel to appear at a hearing, when first attorney was unable to appear. R. Add. pp. 14 & 22-25.

" An attorney at law, by virtue of his employment as such, has authority in behalf of his client to do all acts . . . necessary or incidental to prosecution and management of suit . . ." Storey v. USF&G, 32 Idaho 388. See also, Danti v. Danti, 146 Idaho 929.

"Individuals are generally bound by their attorneys' actions and when that representation falls below professional standards, the usual course of action is not to vacate the judgment under civil procedure rule governing motions for relief from judgment, but to allow a malpractice suit against the attorney." Eby v. State, 148 Idaho 731.

III.

PLAINTIFF WAS NOT ENTITLED TO BE HEARD WHILE IN VIOLATION OF ORDER

It is expressly provided, in IRCP 60(b), that a motion pursuant thereto "does not affect the finality of a judgment or suspend its operation." At the time of the filing of his motion,

plaintiff owed (and continues to owe) many thousands of dollars, in delinquent child support and maintenance, pursuant to the decree herein, from which he did not appeal, and therefore is not entitled to be heard. R. Add. pp. 40-42.

It has been held that:

> the trial court was without authority to proceed with the hearing or modify the decree until the applicant had purged himself of the contempt by payment of the delinquent amounts. Nab v. Nab, 114 Idaho 512, 517,

quoting with approval, from Hoagland v. Hoagland, 67 Idaho 67.

IV

FEES SHOULD BE ALLOWED WHERE MOTION FRIVOLOUS

Plaintiff's motion and appeal having been brought and pursued frivously, unreasonably and without foundation – – attacking a two-decades old judgment, without adequate legal authority– – attorney's fees should be awarded to defendant, pursuant to IRCP 54(e), §12-121 I.C., and IAR 41.

V

ORDER ON DIFFERENT THEORY

It was held, in Southern Idaho Realty v. Hellhake, 1021, 613, 614, that:

> Regardless of the merit in the district court's theory of agency as the basis for its dismissal, we are of the opinion that another theory was present in the case which should have been addressed initially and which is dispositive of the case. It is a well-established rule that where the order of the lower court is correct but entered on a different theory, the order will be affirmed on the correct theory.

The trial court could have justified the dismissal of plaintiff's motion to set aside the decree based upon plaintiff's failure to present a defense by filing a reply to the counterclaim. In addition, he had every opportunity to challenge the decree by requesting a hearing upon his motion to set aside default, or upon his motion for reconsideration. He did neither, and the court properly allowed the default and the decree to stand.

VI

MOTION NOT A SUBSTITUTE FOR APPEAL

A motion pursuant to IRCP 60(b) may not be used as a substitute for a timely appeal. Buback v. Evans, 117 Idaho 510; and Dustin v. Beckstrand, 103 Idaho 780. In the instant case, plaintiff had notice of the entry of the decree more than two decades ago, and has filed no appeal therefrom. R. pp. 1 & 34. See, also, Title v. U.S., 263 F. 3d 28, 31.

CONCLUSION

The decision of the trial court should be affirmed, with fees and costs to defendant.

October 2, 2014

Reginald R. Reeves

REGINALD R. REEVES, ESQ.
Defendant's Attorney
Cambridge Law Center
Idaho Falls, Idaho

CERTIFICATE OF SERVICE
[IRCP 5(f)]

I HEREBY CERTIFY That on this day I served the foregoing upon the designated party, by delivering two copies thereof to his attorney, as follows:

PLAINTIFF

NATHAN M. OLSEN, ESQ.
485 E. Street
Idaho Falls ID 83402

October 2, 2014

Jessica Montalvan

J. MONTALVAN
Legal Assistant